MR. SCHWIRTZ: My name is Mark Schwirtz. I'm the Chief Operating Officer, Senior Vice President of Arizona Electric Power Cooperative.

And just for your information, Arizona Electric Power Cooperative is a generating cooperative in southeast Arizona. We're nonprofit, and we serve rural residents of Arizona and California.

And I appreciate the opportunity to appear before you here today to share the views of the Western Coal Traffic League and my own company, AEPCO. I will be talking about the changes that the Board has proposed and the procedures that govern coal rate cases under the stand alone cost standard.

Kelvin Dowd here from Slover and Loftus will be talking about some of the other proposals that have been put forth as comments to your rules that were published.

I note as well that the statement I offer here is joined by the Consumers United for Real Equity. So I'm representing the Western Coal Traffic League, AEPCO and CURE.

WCTL and its members have been active in all matters related to the development of coal rate policies by the STB and its predecessor sine prior to the Staggers Rail Act of 1980. Individual league members, including AEPCO, have been and are parties to individual maximum coal rate proceedings.

In fact, AEPCO is in its second rate case. The first in the late '70s and early '80s took over ten years to complete, and AEPCO's pending rate case is now into its third year.

WCTL itself was a principal participant in the proceedings that led to the adoption of the Coal Rate Guidelines in 1985. The guidelines, which largely accepted and implemented proposals made by the railroad industry, sought to strike a balance between railroads' interests and those of their captive coal customers.

Subject to a minimum floor of 180 percent of variable costs set by statute, a railroad could charge any rate it chose

so long as it wasn't higher than the rate that an efficient hypothetical competitor would charge to serve the complaining shipper and other shippers in a logical customer group, assuming coverage of all relevant costs and a reasonable return on investment. This standard is known as the stand alone cost or SAC test.

It was sponsored by the railroads, and it was designed to implement the Ramsey pricing principles that the railroads persuaded the Board's predecessors to adopt.

Through the late '80s and '90s, the SAC test seemed to work reasonably well. A relative handful of coal cases were brought under it, and shippers and carriers alike increasingly relied on negotiated contracts to govern the terms of transportation.

Even captive coal shippers did business by contract as the SAC test allowed both sides to calculate what might be a lawful regulatory maximum and so help draw them into a mutual agreement.

This decade, however, has seen a change in landscape motivated by various forces. The few remaining Class 1 mega railroads have embarked on campaigns to raise rates on captive traffic significantly and rely more on common carrier pricing. These campaigns have been announced by the railroad CEOs and are no secret, and AEPCO is very worried about what the future may hold for rates.

The predictable result has been an increase in the number of rate cases before the Board, as the railroad's aggressive revenue demands have left many coal shippers, including AEPCO, with no real choice but to resort to regulatory remedies.

The history of proceedings under the coal rate guidelines show that for high volume movements to destinations, such as electric power plants, a combination of a properly administered SAC test and the 180 percent variable cost floor has

tended to moderate the railroad's pricing on captive coal shipments, while still guaranteeing the railroads significant mark-up over cost.

Knowing this and apparently intent on avoiding any constraints on their rates, carriers have responded to the recent spate of rate cases with a two pronged tactical defense.

First, through motions and requests for new general interest proceedings, the railroads have sought to change the SAC rules to skew the results in their favor. In the summer of 2001, for example, BNSF and UP joined in asking the Board to put four pending coal rate cases on hold, revisit certain elements of the SAC methodology which have been settled for years, and adopt changes designed to drive up rates and make it harder for shippers to prevail.

To its credit, the Board rejected the request. The carriers, however, continue to seek to alter and bias the SAC rules in their favor and in individuals cases themselves.

We are seeking a similar pattern in the area of variable costs. Despite the acknowledged efficiencies and lower costs associated with unit train coal service versus system average service and despite the fact that for years both shippers and railroads use movement specific data to adjust system average costs to reflect these efficiencies, the railroads now increasingly are taking the position that they no longer keep records of movement specific data.

In effect, they argue for a default back to system average costs, which, of course, dries up the variable cost numbers and the jurisdictional rate floor, and I think that's important.

The railroad's second tactical weapon is procedural delay. Though the Board's rules contemplate completion of the evidentiary phase of the rate case within seven months, that rarely, if ever, is possible. By manipulating the discovery process which they largely control sine they are in possession of

most of the data that complainants and the Board need, the carriers force schedule extensions or even suspensions.

As I understand, one way to do this is to wait until the end of the 75 day discovery period to actually product documents and computer data requested by shippers. As there usually are problems with the completeness of the data or disputes over withheld evidence, this tactic presents the shipper with Hobson's choice of either asking for an extension of the schedule to deal with the problem or proceeding on schedule without having all of the data needed to make a complete presentation.

Usually the result is delay. In a similar way carriers lodge routine and repeated objections to the production of documents and records that the Board already has ordered produced in prior cases. This leads to otherwise unnecessary motions to compel that consumer more time and more of the Board's and parties' resources. Again, the result is delay.

The Western Coal Traffic League applauds and supports the Board's past effort to reduce delay and expedite decisions in coal rate cases under the SAC test. The desire for expedition, however, should never be allowed to jeopardize the accuracy of the analysis or the ability of parties to present complete and competent evidentiary cases.

Eliminating discovery altogether or requiring parties to submit cases 30 days after a complaint is filed certainly would expedite decisions, but those decisions, however, would not be very sound or well supported.

In this proceeding, the Board has proposed three changes to its procedural rules that are said to be motivated by a desired goal to expedite the resolution of coal rate disputes. WCTL agrees with the minor modifications that we have outlined in our comments.

Two of these three proposals could contribute positively to the Board's stated goals without compromising the

rights of shippers to have a reasonable opportunity to present their cases for rate relief.

The third of these proposed changes, however, respecting the standard for discovery in SAC cases, is not needed and most certainly would be counterproductive. It should not be adopted.

WCTL agrees that the Board's proposal for a pre-complaint mediation could encourage parties to stipulate or resolve selected issues. That, in turn, could help streamline complaint proceedings.

Frankly, we are skeptical that mediations will lead to outright settlement. Typically coal rate complaints are filed as a last resort only after a shipper and carrier have spent months in unsuccessful negotiations. I know in AEPCO's case it was over a year before we went into this case of negotiations.

So long as the mediation exercise cannot be abused or become a tool for further delay, however, WCTL believes it can be beneficial and is prepared to support it. To this end, WCTL's comments propose certain specific changes in the proposal as offered by the Board.

First, carriers must be prepared to respond promptly to shippers' request for the establishment of new common carrier rates, as only a rate subject to STB jurisdiction could then be the subject of STB ordered mediation.

Second, the Board should mandate that all information exchanged during mediation will be kept strictly confidential and not used for any purpose outside mediation.

Third, the 60 day mediation period should only be subject to extension if both sides agree. Continued mediation is pointless if one side believes impasse has been reached.

Western Coal Traffic League also endorses the Board's proposal to expedite rulings on motions to compel and encourages involvement by STB staff to try to broker negotiated resolutions of discovery disputes that may arise.

As we explained in our comments, however, a few modifications would better promote the Board's goals and protect litigants' due process rights.

First, a staff conference should be held if requested by either party, especially when there is doubt as to the form in which certain relevant data is kept. Certainly a facilitated dialogue between the parties is a more preferable way to clarify discovery requests than a repetitious cycle of requests, costs, replies, and supplemental requests.

Second, the Board should make sure that neither party provides information or data to the Board's staff that is not also provided to the other party at the same time. The staff conferences should be for the purpose of resolving disputes, not allowing one side to try to advance its cause through ex parte contact.

Third, the Board should deal separately with the discovery of transportation contracts. In every case the shipper needs access to certain transportation contracts. The railroad usually is willing to produce the contracts, but can't without a Board order because of confidentiality clauses in the contracts themselves. Again, this results in delay.

While the league basically supports the rule changes that I've just addressed and the modifications described in our comments, we are very much opposed to the Board's proposal to change the basic standard for discovery in SAC cases. This proposed change is prejudicial, unnecessary, and counterproductive, and should not be adopted.

As we explained in our comments, a new discovery standard that narrows the scope of data and documents that must be made available would overwhelmingly prejudice shippers as they are the parties most in need of discovery to assemble their cases. In other words, the railroads hold all of the cards.

The same is true of variable costs. Raising the bar to complete discovery simply would play into the carrier's current

strategy of withholding relevant data in order to force reliance on system average variable costs and deny complainants the opportunity to assemble a proper SAC presentation. The proposed new tests would reward past obstructionism.

The stated purpose of the proposed new discovery standard is to try to streamline the process and reduce procedural delay. WCTL believes that strict enforcement of the standards and precedents that the Board already has established, coupled with the proposal to expedite rulings on motions to compel will accomplish this purpose.

As we showed in our comments, the Board's rulings under the current standard already consider the need for disputed data and the relative burden of producing it.

In balancing the competing interests of shippers and carriers, the Board already applies the principles behind its proposal. A change in the language of the rule itself is not needed and only would be exploited by the railroads to withhold relevant evidence.

This is graphically demonstrated by the Burlington Northern-Santa Fe Railway comments in the proceeding. In AEPCO's own pending rate cage, the Board ordered BNSF to produce Road property investment and other relevant data after assessing AEPCO's need for the information and its inability to obtain it elsewhere, essentially the same test the Board now proposes to adopt.

In its comments, however, BNSF takes the position that if a test was in place, it is unlikely that it would have had to to produce the data in question. In other words, BNSF admits that it intends to resist what the Board already has found to be legitimate discovery requests by arguing that the complainant does not have a clear and demonstrable need for evidence. There is no reason not to expect that the other railroads would do the same.

In our view the proposed new discovery rule would be

counterproductive. As BNSF comments show, railroads would seize the new standard as a weapon and try to exploit it to deny shippers access to data that the Board already has found is relevant and necessary to a proper evidentiary presentation on variable costs and/or SAC issues.

The results will be more, not less discovery litigation and more procedural delays.

My company has experienced not only in coal rate litigation before the Board, but in general civil litigation, commercial arbitrations, regulatory proceedings before FERC and Arizona state agencies. Neither the typical number of discovery requests nor the volume of data and documents produced in a rate case under SAC is out of line with that which is usually involved in commercial disputes where millions of dollars are at stake.

The Board's desire to reduce delay and expedite decisions in cases brought before it is a laudable and we support it. Respectfully, however, we submit that the record shows that the best way to do that is to aggressively enforce your existing rules and precedents and firmly resist railroads' efforts to revise established rules and standard in order to rig the game in their favor.

It is bad enough that the burden of proof is placed on shippers to show that the rate is too high, but to also obstruct the production of critical data to the shipper's case only results in delay and additional cost to the shipper.

I appreciate the opportunity to appear and share the views of WCTL and its members, including my own company and CURE, and I'd be happy to respond to any questions that I am qualified to answer.